violations affect interstate commerce. *See* 18 U.S.C. § 1951(a). While federal courts generally only require a *de minimus* effect on interstate commerce, the Seventh Circuit's application of the "depletion of the assets theory" in *Re I* sets the bar to entry into federal courts at an unprecedented low and in doing so conflicts with several other circuits. *See United States v. Elders*, 569 F.2d 1020, 1024-25 (7th Cir. 1978) ("Under the depletion of assets theory, commerce is affected when an enterprise, which either is actively engaged in interstate commerce or customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of such goods.").

The conflict among the circuits centers around the type of evidence required to show that a business is "active" in interstate commerce under the depletion of assets theory. While there is not a uniformity among the circuits as to the number of purchases required to be "actively" engaged in interstate commerce, it can be said with certainty that the number is more than one, especially when that one could have occurred at any time over a twenty year period. *See, e.g., United States v. Merolla*, 523 F.2d 51, 54-55 (3rd Cir. 1975) (reversing Hobbs act convictions because the interstate purchases at issue appeared to be a one time occurrence in part because it was not established that the business was ongoing); *United States v. Hebert*, 131 F.3d 514, 523, n. 8, 523-24 (5th Cir. 1997) (affirming Hobbs Act conviction because "[t]he government elicited testimony from managers or owners of each of the robbed establishments that each robbery depleted cash assets of the store or restaurant, and *it was the regular course of business of that store or restaurant to buy products from out of state*") (emphasis added); *United States v. Peach*, 113 F.3d 1247, No 96-3233, 1997 WL 282867, * 7 (10th Cir. May 28, 1997) (affirming Hobbs Act conviction when "the government demonstrated the money taken in the robbery would have been used to purchase

supplies for the diner from Wonder Hostess in St. Louis, Missouri; Milani Foods in Charlotte, North Carolina; Mid-Central/SYSCO in Kansas City, Missouri; and Meadow Gold in Dallas, Texas.").

The Seventh Circuit's reliance on the victim's conclusory and imprecise testimony about his undated use of gas, paint, and tools that were not shown to have traveled in interstate commerce conflicts with this Court's prior commerce clause decisions that recognize that recognize that Congress can only regulate criminal activity that substantially affects interstate commerce. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). In the Lopez and Morrison opinions, this Court recognized that even Congress cannot simply conclude that an activity affects interstate commerce. *Morrison*, 529 U.S. at 614; *Lopez*, 514 U.S. at 557 n.2. Thus it should not be sufficient for victims of crimes to simply state that goods traveled in interstate commerce without any evidentiary support. If such a practice is countenanced, the line between federal and state power disappears.

Review by writ of certiorari is appropriate to resolve the differing applications of the "depletion of assets theory" under the Hobbs Act and to re-emphasize that federal authority to prosecute violations must only be exercised when it is consistent with the limits of the federal commerce clause power.

2. This Court's Decision in *United States v. Booker*, 125 S. Ct. 738 (2005) has Created a Circuit Split, Causing Great Disparity in the Treatment of Individuals Sentenced Pre-*Booker*.

In *Booker*, this Court noted that the stated statutory goal of the Sentencing Guidelines was to create "a system that

diminishes sentencing disparity." *Booker*, 125 S.Ct. at 759. Unfortunately, the ripples of this Court's decision have carried those individuals sentenced pre-*Booker* in opposite directions from each other.

As has already been brought to this Court's attention in the petitions for certiorari filed in *Rodriguez v. United States*, Docket No. 04-1148 (denied June 20, 2005) and *United States v. Barnett*, Docket No. 04-1690 (dismissed by stipulation pursuant to Rule 46 September 20, 2005), there exists a wide-ranging, multi-circuit conflict on the proper analysis of plain error under *Booker*. The First, Fifth and Eleventh Circuits require defendants to show that there exists a reasonable probability of a different outcome had the sentencing guidelines not been treated as mandatory in order to satisfy the third step of plain-error review. *See United States v. Antonkopoulas*, 300 F.3d 68 (1st Cir. 2005), *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005), *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.). On the other end of the spectrum, the Third and Sixth Circuits presume that a defendant was prejudiced by the application of the illegal mandatory sentencing guidelines. *See United States v. Davis*, 407 F.3d 162 (3d Cir. 2005), *United States v. Miller*, 417 F.3d 358 (3d Cir. 2005), *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005). Situating themselves squarely in the middle, the Second and Seventh Circuits have instituted a system of limited remands in which the district court is asked to determine whether it would reimpose its original sentence. *See United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005).

In this case, the Seventh Circuit issued just such a limited remand and the District Court found that it would have issued the same sentence even if the guidelines had been advisory at the time of sentencing. (*Re I*, App. 17). Nevertheless, the District Court noted that "[i]f post-sentencing events and conduct were properly to be considered, I cannot honestly say whether or not the sentences would remain the same. In fact,

they may well not be." *Re II*, 419 F.3d at 583. In response, the Seventh Circuit ruled that District Courts must exclude post-sentencing events and conduct from consideration in a *Booker* remand. *Id.* This ruling stands in stark opposition to Third Circuit precedent, in which District Court's "tak[e] into account any new facts or information made available to the Court since Defendant's pre-*Booker* [] sentencing." *United States v. Paz*, 384 F. Supp.2d 806, 807 (E.D. Pa. 2005).

Review by writ of certiorari is appropriate to resolve the disparate treatment of individuals sentenced pre-*Booker*.

3. *Booker* Does Not Purport to Change *Blakely's* Holding that for *Apprendi* Purposes the Statutory Maximum Sentence in the Sentencing Range Without Unconstitutional Enhancements Regardless of Whether the Guidelines Are Only "Advisory." To Hold Otherwise Again Renders the Guidelines Effectively Mandatory and Fails to Prove Any Cure for the Sixth Amendment Violation Inherent in a Sentencing Range that Includes Unconstitutional Judicial Factfinding Enhancements.

The Sentencing Guidelines were long criticized for permitting enormous increases in sentences imposed without benefit of proof beyond a reasonable doubt with the implications the preponderance standard has on reliability and accuracy. The Supreme Court's decision in *Blakely v. Washington* appeared to interpose a barrier to such sentencing. However, post-*Booker*, a defendant's "maximum potential sentence [may] balloon . . . based . . . on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong." *Blakely v. Washington*, 542 U.S. 296, 312 (2004).

Chapter Six of the Guidelines permits any evidence which has "sufficient indicia of reliability to support its probable accuracy" to be used to increase a sentence and the Sentencing Commission "believes" that use of a preponderance of the evidence standard is good enough. However, there is no statutory basis for this assertion. Justice Thomas in *Booker* wrote that Justice Stevens' substantive majority opinion "corrects the [Sentencing Commission's] mistaken belief," set forth in U.S.S.G. § 6A1.3, that "use of a preponderance of the evidence standard is appropriate to meet due process concerns and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." 125 S.Ct. at 799 (Thomas, J. concurring in substantive majority opinion, dissenting to remedial majority opinion).

As a result of *Blakely*, some courts have demonstrated a new concern for procedural fairness in fact finding, but apparently little interest in grounding it in constitutional rights. See *United States v. Dean*, 414 F.3d 725, 730 (7th Cir. 2005) (post-*Booker* fact finding at sentencing does not require "trial by jury, proof beyond a reasonable doubt, consideration limited to evidence that satisfies the requirements of admissibility that are found in the Federal Rules of Evidence, or any other such formalities." *Id.*

The overriding question here is whether *United States v. Booker*, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), overruled the essential holding in *Blakely v. Washington*, 542 U.S. 296 (2004), that the Sixth Amendment bars the use of facts not proven to a jury beyond a reasonable doubt, even though the "constitutional majority opinion" states that, "[we] hold that the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines." (125 S.Ct. at 746, 160 L.Ed.2d at 639.) What this devolves to is whether the *Blakely* definition of a "statutory maximum sentence" for *Apprendi* purposes continues to be "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (emphasis in original). The

determination that the defendant acted with deliberate cruelty, like the determination in *Apprendi* that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated *Blakely's* Sixth Amendment rights." *United States v. Booker*, 125 S.Ct. 738, at 749; 160 L.Ed.2d 621, at 643 (2005).

Since *Booker*, federal courts have largely found that a properly calculated Guidelines Sentence - with enhancements - to be presumptively reasonable. *United States v. Newsom*, 2005 U.S. App. LEXIS 23641 (Nov. 2, 2005); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). But some courts, perhaps cognizant of the criticisms of the Guidelines, have reviewed the challenged use of mandatory enhancements under the "harmless error" standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), placing a "heavy burden" on the government to demonstrate beyond a reasonable doubt that the "error did not contribute to the sentence obtained." *United States v. Coumanis*, 399 F.3d 343, 351 (D.C. Cir. 2005).

This Court has recently granted a petition for certiorari raising whether *Blakely* error can ever be "harmless". *State of Washington v. Recuenco*, 2005 U.S. LEXIS 7658, Docket 05-83 (Oct. 17, 2005.) We suggest that it cannot be "harmless", given the structural nature of the error. With the loss of Chief Justice Rehnquist, Justice Scalia is the only member of this Court who has written on this issue, dissenting in *Neder v. United States*, 527 U.S. 1 (1999):

> When this Court deals with the content of [the jury trial] guarantee — the only one to appear in both the body of the Constitution and the Bill of Rights — it is operating upon the spinal column of American democracy....

Even if we allowed (as we do not) other structural errors in criminal trials to be pronounced "harmless" by judges ... it is obvious that we could not allow judges to validate this one. The constitutionally required step that was omitted here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt.* Perhaps the Court is so enamored of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution. Who knows? — 20 years of appointments of federal judges by oppressive administrations might produce judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively — at least in the view of the citizens in some vicinages where criminal prosecutions must be brought. And so the people reserved the function of determining criminal guilt to themselves, sitting as jurors. It is not within the power of us Justices to cancel that reservation — neither by permitting trial judges to determine the guilt of a defendant who has not waived the jury right, nor (when a trial judge has done so anyway) by reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty.

See also Crawford v. Washington, 541 US 36, 62 (2004) ("dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.") (Scalia, J., writing for the majority).

In sum, Petitioners assert their Sixth Amendment rights and seek protection pending the Court's resolution of *Recuenco*.

CONCLUSION

For the reasons stated above, petitioners pray that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

Respectfully submitted,

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United States Court of Appeals,

Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Randall RE and Anthony Calabrese, Defendants-Appellants.

Nos. 03-2089, 03-2129

Argued April 8, 2004.

Decided March 22, 2005.

Before KANNE, EVANS, and WILLIAMS, Circuit Judges.

KANNE, Circuit Judge.

A jury found both Randall Re and Anthony Calabrese guilty of conspiring to commit extortion and conspiring to travel to commit extortion. In this consolidated appeal, the defendants challenge their convictions and their sentences. We affirm their convictions, but pursuant to *United States v. Booker*, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) and *United States v. Paladino*, No. 03-2296, 2005 WL 435430, at *7, 401 F.3d 471, 481 (7th Cir. Feb.25, 2005), we order a limited remand regarding their sentences.

I. History

Re and his wife, who lived near Chicago, Illinois, jointly owned a warehouse in Englewood, Florida. The tenancy of

the warehouse was sporadic. In fact, the warehouse was vacant more than it was occupied. Next to the Re property was a warehouse owned by Gregory Leach. Because of their neighboring properties, Leach and Re have known each other since the early 1990s. However, various disputes over the years, including one that escalated to the point of a lawsuit, strained their relationship.

In the spring of 1997, Re listed his warehouse for sale at $279,000. After the list price was reduced to $259,000, a potential buyer, Jimmy Daughtry, surfaced. Daughtry offered Re $200,000, which Re rejected, countering with a $240,000 offer.

Daughtry ultimately decided to lease warehouse space from Leach. Daughtry's decision to lease from Leach, instead of buying from Re, hinged upon representations Leach made to Daughtry. According to Daughtry's real estate agent, Leach told Daughtry that a sewer line connecting Re's property with a local service station had been installed across Leach's property without Leach's permission, without appropriate permits, and without any inspections. On the same day the lease agreement was signed, April 17, 1997, Daughtry's real estate agent informed Re via facsimile that Leach's statements to Daughtry about the sewer line killed the sale. The agent even went so far as to advise Re to sue Leach if what Leach had said was untrue.

A. The Assault

On May 3, 1997, Leach was contacted by another "potential lessee," a person who identified himself as Sammy Bender. Leach agreed to meet "Bender" at the warehouse so that Bender could inspect the warehouse space. When Leach

arrived at the warehouse, he noticed two men in a dark car parked adjacent to the warehouse. As he approached the warehouse, one of the men stepped out and introduced himself as Bender. The other man stayed in the vehicle, slouched down, and appeared to be sleeping. Leach escorted Bender into the warehouse. Prompted by questions from Bender, Leach confirmed that he owned the warehouse and knew Daughtry. At that point, an unidentified person struck Leach from behind with a baseball bat. Bender punched Leach in his face and throat.

As Leach was falling to the floor, he reached for a small gun he had brought with him, which he was licensed to carry. The man with the bat warned Leach that he would be killed if he was "going for" a gun. One of the men then took the gun from Leach's pocket. The beating continued for a minute or so, and Leach was hit in the ribs, arms, legs, and feet.

As he was being beaten, one of his assailants told Leach to "tell Jimmy [Daughtry] to move out" and repeatedly asked Leach if he was "getting the message." Leach stated numerous times that he "got the message." Eventually, the two men fled. Leach then called 911 and his wife, gave a description of the two men to the responding police officer, and drove himself to the hospital.

B. Telephone Calls Closing the Matter

Two days after the attack, Leach called Re in Illinois and told Re that he did not want any more problems with their warehouse properties. Re agreed. During their conversation, Leach also explained that he told Daughtry that he would tear up the lease at any time if Daughtry wanted to move out, but that Leach had no legal reason to break the lease. Re

responded that Leach could get Daughtry out if Leach wanted to.

On May 7, Re called Leach. He told Leach he was thinking of suing Daughtry, and Leach repeated that he was willing to tear up Daughtry's lease. Re requested Daughtry's phone number, which Leach provided. With Leach still on the line, Re phoned Daughtry, disconnecting Leach as soon as Daughtry answered. Leach and Re never spoke again. On May 12, "Bender" called Leach and informed him that the "matter was closed."

C. Evidence Linking Re to Calabrese

Between April 22 and April 30, 1997, telephone records show thirteen communications between Re and Calabrese, his co-defendant. No communications occurred between May 1 and May 4.

Re and Calabrese both resided near Chicago, Illinois. However, on the day of Leach's beating, both had traveled to Florida. Re had flown to Florida to attend his father-in-law's funeral on the morning of May 3. Calabrese was visiting Florida with a friend. He rented a car on May 2 in an area near Leach's warehouse. On May 3, Calabrese, accompanied by Robert Buckley, visited Dennis Kowalski. Approximately one hour after their arrival, Calabrese and Buckley exited Kowalski's home through a door next to which Kowalski kept a silver aluminum baseball bat, stating that they would return. The two returned one to two hours later. The next day, Calabrese gave Kowalski a gun and told Kowalski to "keep it or get rid of it."

Kowalski kept the gun until September 1999, when he gave it to Jeff Cox. Cox stored the gun in his attic. In April 2000, Cox sold his home to Randy Bergman. Shortly after moving in, Bergman discovered the gun in the attic and took it to a Florida Sheriff's office. It was turned over to the Federal Bureau of Investigation. A search of the National Crime Information Database revealed that the serial number on the gun discovered by Bergman matched the number of Leach's gun, which was taken from him during the May 3, 1997, attack.

D. Leach's Identification of Calabrese

Immediately following the assault, Leach described Bender to a Sarasota, Florida, sheriff's deputy as a white male, 5'11" tall, approximately 240 pounds, having dark hair and a dark complexion, appearing to be Italian with a square jaw, and wearing gold chains.

Nine months after the incident, Leach described Bender to a Naperville, Illinois, police detective as a white male, 5'10" tall, approximately 35 years of age, 190 pounds, with short curly hair and a beard and mustache.

In the spring of 1998, Leach viewed two photo line-ups. From the first line-up, he picked out a man who was later identified as Calabrese. At trial, Leach identified Calabrese as the man who had assaulted him and who was known to him as "Bender." From the next photo line-up, Leach identified a man who he thought was his second attacker. However, it was later determined that the individual Leach selected from that line-up was not, in fact, present at the May 3 assault. As a result, this person was never charged with any crime resulting from these events.

II. Procedural Posture

On November 1, 2002, the defendants were found guilty of conspiring to commit extortion, 18 U.S.C. § 1951 (Count 1), and conspiring to travel to commit extortion, 18 U.S.C. § 1952 (Count 2). The defendants jointly moved for a judgment of acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. The motion was denied. On November 22, the district court sentenced each defendant to eighty-seven months imprisonment for Count 1 and sixty months imprisonment for Count 2, with the sentences to run concurrently. In addition, a three-year term of supervised release and a fine of $12,500 were imposed. The defendants have appealed their convictions, and their sentences.

III. Analysis

A. Convictions

The defendants mount three challenges to their convictions. First, they assert that the district court erred when it limited defendants' inquiry into Leach's misidentification of his assailant in the second photo line-up. Second, they generally question the sufficiency of the evidence to support their convictions. Third, they specifically assert that the government's evidence was insufficient as to the interstate commerce element required under § 1951 ("the Hobbs Act"). Although the third issue merits a moment's pause, we ultimately conclude that all these arguments must fail.

1. Misidentification

The defendants claim that their convictions must be reversed because of an incorrect evidentiary ruling by the district court. During the cross-examination of Leach, defense counsel attempted to discredit Leach's identification of "Bender" by highlighting Leach's indisputably incorrect identification of his second attacker. At one point, counsel asked Leach, "You don't see [the person you identified in the second photo line-up] in the courtroom today?" The government objected, and the district court sustained the objection, further instructing the defense to avoid any similar questions. In so ruling, the court differentiated between Leach's ability to identify his attackers, a proper subject for cross-examination, and the government's exercise of prosecutorial discretion, an improper subject for cross-examination. Defendants now assert that the restrictions placed upon Leach's cross-examination by the district court were in error.

We review the trial court's limitation of the scope of Leach's cross-examination for abuse of discretion. *United States v. Lane,* 323 F.3d 568, 579 (7th Cir.), *cert. denied,* 540 U.S. 818, 124 S.Ct. 84, 157 L.Ed.2d 35 (2003); *United States v. Jackson,* 51 F.3d 646, 652 (7th Cir.1995). Under this deferential standard, an abuse of discretion occurs only when no reasonable person could take the view of the district court. *Lane,* 323 F.3d at 579 (quotation omitted). And even if the trial court did abuse its discretion, we will not reverse a jury verdict if the erroneous ruling is harmless. *Id.* (citing Fed.R.Crim.P. 52(a); *Rehling v. City of Chicago,* 207 F.3d 1009, 1017 (7th Cir.2000)).

With respect to its aforementioned limitation of Leach's cross-examination, the district court reasoned that any inquiry into why the person identified by Leach in the second photo array was not prosecuted, assuming the relevance of such testimony, could not be permitted under Rule 403 of the

Federal Rules of Evidence [FN1] because it would be "too remote," or, in other words, misleading and confusing to the jury. However, defense counsel was allowed to cross-examine Leach extensively about the quality of his descriptions and identifications of both "Bender" and the unknown assailant. Defense counsel did, in fact, highlight numerous inconsistencies.

FN1. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...."

Later, during the defense's cross-examination of one of the investigating detectives from the Naperville Police Department, the problematic aspects of Leach's description of the unknown attacker were again pointed out to the jury, while no inquiry into the exercise of prosecutorial discretion was attempted. Counsel also sought to admit the second photo line-up, which prompted a government objection. While the court implicitly reaffirmed that the government's charging decisions are not proper subjects for cross-examination and argument, the court clarified that the accuracy of Leach's identification of his unknown attacker is relevant to his credibility in that it may demonstrate Leach's inability to identify persons generally, including "Bender." Therefore, the court permitted the line-up to be admitted as evidence.

We fail to see how the district court's limitation of Leach's cross-examination was in error, particularly given its later evidentiary rulings allowing extensive inquiry into the quality of Leach's identifications and the admission of the second photo line-up. On appeal, the defendants claim that the ruling was in error because the particular question counsel attempted to ask Leach during his cross-examination was posed only to

illustrate Leach's inability to correctly identify his assailant, which was an unquestionably relevant topic of inquiry. However, this ignores the specific phrasing of the question--"You don't see [the person you identified in the second photo line-up] in the courtroom today?"--which indeed implicated (or, at the very least, raised the specter of) the government's exercise of prosecutorial discretion.

We agree with the district court that *the fact of the government's decision not to prosecute* the individual Leach misidentified as his unknown assailant in the second photo line-up was distinct from and irrelevant to *Leach's ability to identify his assailants.* As the record demonstrates, the court in no way prohibited inquiry into the quality of Leach's identifications.

In fact, the district court allowed the defense to question Leach and other witnesses at great length about the accuracy, specificity, and consistency of Leach's descriptions of both "Bender" and his other assailant. And, as we noted above, the court allowed the second photo line-up to be entered into evidence. Hence, the defense was given ample opportunity to suggest to the jury that because Leach's identification of his unknown assailant was unreliable (in fact, totally incorrect), his identification of "Bender" was also suspect. *See, e.g., United States v. Corgain,* 5 F.3d 5, 7-8 (1st Cir.1993). In short, we conclude that the district court correctly determined that under Rule 403, the question asked by counsel, given its specific phrasing, would mislead and confuse the jury. The limitation of Leach's cross-examination was not in error.

2. Sufficiency of the Evidence

The defendants also contend that the evidence was insufficient to support their convictions as to both counts. Viewing all evidence and drawing all reasonable inferences in the light most favorable to the government as we must, *United States v. Hicks,* 368 F.3d 801, 804-05 (7th Cir.2004), their challenge fails. It is impossible for us to say that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See id.*

"To sustain a conspiracy conviction, the government must prove that 'two or more persons joined together for the purpose of committing a criminal act and that the charged party knew of and intended to join the agreement.' " *United States v. Macedo,* 371 F.3d 957, 965 (7th Cir.2004) (quoting *United States v. Adkins,* 274 F.3d 444, 450 (7th Cir.2001)). But direct evidence of the conspiratorial agreement is not necessary. A jury may "find an agreement to conspire based upon circumstantial evidence and reasonable inferences drawn [from] the relationship of the parties, their overt acts, and the totality of their conduct." *Id.* (quotation omitted). Moreover, [d]ue to the covert nature of a conspiracy, direct evidence is rare and not only is the use of circumstantial evidence permissible, but circumstantial evidence may be the sole support for a conviction.... Circumstantial evidence is not less probative than direct evidence and, in some cases is even more reliable.... The evidence need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt.

United States v. Rodriguez, 53 F.3d 1439, 1445 (7th Cir.1995) (citation omitted).

We summarize briefly the key evidence the government introduced at trial which permitted the jury to infer that Re and Calabrese conspired to extort Leach: (1) Re and

Calabrese knew each other and both lived near Chicago, Illinois; (2) Re and Calabrese contacted each other frequently in the days leading up to Leach's attack; (3) both were in Florida on the day Leach was attacked; (4) Re had tried unsuccessfully to sell his warehouse (which was vacant a majority of the time) to Daughtry; (5) Re had a strong financial motive to extort Leach because Leach's lease of his warehouse to Daughtry cost Re his sale; (6) Leach and Re had an acrimonious history; (7) Leach's assailants, after confirming that Leach owned the warehouse and knew Daughtry, indicated during the attack that their purpose was to induce Leach to convince Daughtry to break his lease; (8) Re indicated to Leach after the assault that he believed Leach could "get Daughtry out" if Leach wanted to do so; (9) Leach positively identified Calabrese (also known as "Bender") as one of his attackers; and (10) the gun taken from Leach during his attack was linked to Calabrese. This circumstantial evidence was sufficient to support the defendants' convictions as to both counts.

3. Interstate Commerce Element of § 1951

The defendants also claim that the evidence presented by the government did not demonstrate that the alleged conspiracy affected interstate commerce, as required under § 1951. [FN2] A *de minimis* or other slight effect on interstate commerce is sufficient to meet this requirement. *See, e.g., United States v. Peterson,* 236 F.3d 848, 852 (7th Cir.2001); *United States v. Bailey,* 227 F.3d 792, 797 (7th Cir.2000); *United States v. Morgano,* 39 F.3d 1358, 1371 (7th Cir.1994). Moreover, the impact on commerce need not be actual; given that the Hobbs Act criminalizes attempts as well as completed crimes, it is enough that the conduct (here, the conspiracy to extort) had the potential to impact commerce. *Morgano,* 39 F.3d at 1371.

FN2. Section 1951 states:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

As with the defendants' sufficiency challenge discussed above, they face an uphill battle here. *See United States v. Sanchez,* 251 F.3d 598, 601 (7th Cir.2001). We again view all the evidence and draw all reasonable inferences in the light most favorable to the prosecution and uphold the verdict so long as any rational trier of fact could have found the interstate commerce element beyond a reasonable doubt. *Hicks,* 368 F.3d at 804-05.

In this case, the government relied upon a "depletion of assets theory" to meet the interstate commerce requirement of the Hobbs Act. Under this theory, commerce is affected when an enterprise which customarily purchases items in interstate commerce has its assets depleted through extortion, which in turn limits the victim-enterprise's potential as a purchaser of goods. *See United States v. Elders,* 569 F.2d 1020, 1025 (7th Cir.1978). At trial, the government established the following: (1) if Daughtry had not paid Leach rent, Leach would have had less money to pay the expenses associated with Leach's warehouse; (2) Leach used out-of-state paint, tools, and gasoline (for certain equipment) to maintain the warehouse; (3) Leach used an "Echo" brand weed-eater to cut the weeds and grass around his building; (4) Echo is located in Lake Zurich, Illinois, and London, Ontario.

The evidence relied upon by the government indeed pushed the jury's inferential powers to the outermost limits. As we explained above, under the depletion of assets theory, the *victim-enterprise* must *customarily purchase* goods in interstate commerce. We find it particularly troubling that the government never affirmatively established when and with what funds Leach acquired the weed-eater, gas, paint, and tools. [FN3] Nor did the government present any direct evidence to establish that the gas, paint, and tools used by Leach to maintain the warehouse had traveled in interstate commerce. [FN4] Hence, the jury could have inferred, for example, that Leach purchased only one weed-eater twenty years ago. If so, such would not amount to the *customary purchase* of interstate goods, as required. Likewise, if Leach simply used gasoline, paint, and tools he had purchased for his personal consumption, then no *victim-enterprise* (i.e., warehouse) funds would have been used to purchase those interstate goods, as required. Had the jury inferred that either or both of these scenarios were true, then it would have been precluded from finding that the interstate commerce requirement of the Hobbs Act was met.

FN3. Although the defendants correctly point out that Leach never expressly testified that he *purchased* gas, paint, and tools (stating only that those items were *used* to operate the warehouse), we find that inference to be eminently reasonable.

FN4. Leach testified that--presumably to the best of his knowledge-- the gas, paint, and tools he used were from outside the state of Florida. Absent any contrary evidence by the defendants, this *de minimis* showing is sufficient to establish the interstate nature of these goods.

However, we conclude that the above evidence, taken as a whole and construed in the light most favorable to the government, is sufficient to sustain the defendants' § 1951 convictions. The jury inferred--as it was entitled to do--that the out-of-state weed-eater, gas, paint, and tools were purchased on a customary basis by Leach exclusively for warehouse-related maintenance. In addition, we note that an extortion victim's customary use of out-of-state gasoline might alone meet the interstate commerce requirement, although no case has yet so held (and we expressly decline to do so here). *See Bailey,* 227 F.3d at 799 (declining to reach the issue). [FN5] Arguably, Calabrese's interstate travel to perform the assault, combined with Leach's purchase of out-of-state gasoline, tools, paint, and weed-eater, is enough to meet the interstate commerce requirement. *See United States v. Le,* 256 F.3d 1229, 1236-37 (11th Cir.2001). In short, although the government may have been able to produce stronger evidence establishing a potential effect on interstate commerce, we cannot say that no rational trier of fact could have concluded that this element was met beyond a reasonable doubt.

FN5. *See also Morgano,* 39 F.3d at 1371 (parties stipulated that the natural gas the extortion victim purchased was from out-of-state and hence met the interstate commerce requirement); *United States v. Frasch,* 818 F.2d 631, 634-35 (7th Cir.1987) (same); *United States v. Conn,* 769 F.2d 420, 424 (7th Cir.1985) (purchase of gasoline, in addition to office supplies and equipment and rental cars, sufficient to meet the interstate commerce requirement).

B. Sentences

Sentencing in federal courts has been altered in several important ways by the Supreme Court's recent decision in

United States v. Booker, --- U.S. ----, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). The Court reaffirmed *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and extended its holding to the federal Sentencing Guidelines, concluding that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 125 S.Ct. at 756. In order to remedy this constitutional problem, the Court held that the Guidelines are no longer mandatory. *See id.* at 757. The district court has discretion to sentence outside the Guideline range as long as the sentence is reasonable. *See id.* at 765-66.

Re and Calabrese were convicted of one count of conspiring to commit extortion and one count of conspiring to travel to commit extortion. Under the Guidelines, the base level for these offenses is 18, which corresponds to a sentence of 27-33 months. The sentencing court, however, sentenced the defendants to 87 months after making several findings under a preponderance of the evidence standard. The court enhanced the sentences two levels after finding that the offenses involved an express or implied threat of death or bodily injury, four levels because a dangerous weapon was used, and three levels based on a finding that the victim sustained a bodily injury between the defined categories of "Bodily Injury" and "Serious Bodily Injury."

Re and Calabrese now claim that their sentences were imposed in violation of the Sixth Amendment as clarified by *Booker*, and that the sentences should be vacated. The defendants did not argue that the Guidelines were unconstitutional in the district court; therefore, we must now review their sentences under the plain error standard. *See Booker*, 125 S.Ct. at 769; *United States v. Cotton*, 535 U.S.

625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). A four-part test was set forth by the Supreme Court to determine plain error. *Cotton*, 535 U.S. at 631-32, 122 S.Ct. 1781; *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). "[B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights." *Johnson*, 520 U.S. at 466-67, 117 S.Ct. 1544 (internal quotations and citation omitted). Only if these conditions are met may an appellate court "exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467, 117 S.Ct. 1544 (internal quotations and citation omitted).

So, the first inquiry is whether there was an error that was plain. The Supreme Court held that error is plain when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal...." *Id.* at 468, 117 S.Ct. 1544. This "criterion is satisfied in cases such as these after *Booker*." *United States v. Paladino*, No. 03-2296, 2005 WL 435430, at *7, 401 F.3d 471, 481 (7th Cir. Feb.25, 2005).

Although the sentences were unconstitutionally imposed, we do not know whether the defendants' rights were substantially affected because we do not know if the district judge would have imposed the same sentences even with the increased discretion permitted by *Booker*. Therefore, we will retain jurisdiction of the appeal and "order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence." *Id.* at *10, at 484. If the district court determines that it would have imposed the same sentence, there is no prejudice and thus no plain error, but the sentence will still be reviewed for reasonableness. *Id.* If the sentencing judge determines that he would have imposed different sentences under the *Booker*

standard, we will vacate the original sentences and remand the cases for resentencing. *Id.*

IV. Conclusion

For the foregoing reasons, we AFFIRM the convictions of Re and Calabrese. While retaining jurisdiction, we order a limited remand of their sentences in accordance with *Booker*, *Paladino*, and this opinion. The district court is directed to return this case to us when the limited remand has been completed.

App. 18

United States Court of Appeals,

Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Randall RE and Anthony Calabrese, Defendants-Appellants.

No. 03-2089, 03-2129.

Submitted July 6, 2005.

Decided Aug. 12, 2005.

Before KANNE, EVANS, and WILLIAMS, Circuit Judges.

KANNE, Circuit Judge.

On November 1, 2002, Anthony Calabrese and Randall Re were convicted of conspiring to commit extortion and conspiring to travel to commit extortion. After considering the relevant enhancements, the district court sentenced both men to 87 months' imprisonment for Count 1 and 60 months for Count 2, with the sentences to run concurrently. Because the sentences were imposed under a mandatory sentencing guidelines regime, we ordered a limited remand in accordance with *United States v. Paladino,* 401 F.3d 471 (7th Cir.2005).

In a *Paladino* remand, this court retains jurisdiction over the appeal and the district judge is instructed to "determine whether he would (if required to resentence) reimpose his original sentence. If so, we will affirm the original sentence against a plain-error challenge provided that the sentence is

reasonable[.]" *Id.* at 484 (internal citation omitted). If, however, the judge decides that he would have sentenced the defendant differently under an advisory guideline regime, we will vacate the original sentence and remand for resentencing. *Id.*

In the course of this limited remand, the district court is to consider the sentencing factors set out in 18 U.S.C. § 3553(a). "Judges need not rehearse on the record all of the considerations that 18 U.S.C. § 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less." *United States v. George,* 403 F.3d 470, 472-73 (7th Cir.2005).

Here, Re and Calabrese argue that they should be resentenced because the extraordinary progress they have both made while incarcerated proves that 87- month sentences are unjust. They presented the district court with evidence of classes they have taken, good works they have done, and letters from various friends and family members noting that they have changed for the better while in prison and asking the court to shorten their sentences.

Chief Judge Kocoras found that if he had known at the time of sentencing that the guidelines were merely advisory, he would have imposed the same sentences because of the seriousness of the violent crimes committed by the defendants. However, "[i]f post-sentencing events and conduct were properly to be considered, I cannot honestly say whether or not the sentences imposed would remain the same. In fact they may well not be.... [But if,] the record that was to be considered terminated at the time of the original sentencing was considered, I think the sentence would be the same."

The purpose of the limited remand is to decide whether the court committed plain error when it originally sentenced the defendants. *See Paladino*, 401 F.3d at 483-84. If, at that time, the judge would have chosen a different sentence had he known that the guidelines were not mandatory, plain error occurred. Here, the district court correctly excluded post-sentencing events and conduct and determined that it would have imposed the same sentence; therefore, there is no prejudice, no plain error, and the original sentence stands. *Id.* at 484. Having made that determination, we must now review the sentence for reasonableness. *See United States v. Booker*, --- U.S. ----, ----, 125 S.Ct. 738, 765, 160 L.Ed.2d 621 (2005).

This court has held that "any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness." *United States v. Mykytiuk*, 415 F.3d 606, 2005 WL 1592956, at *1 (7th Cir. July 7, 2005). "The defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in § 3553(a)." *Id.* at *2. The defendants "must be given an opportunity to draw the judge's attention to any factor listed in [§] 3553(a) that might warrant a sentence different from the guidelines sentence [.]" *See United States v. Dean*, 414 F.3d 725, 2005 WL 1592960, at * 5 (7th Cir. July 7, 2005).

As we noted, however, in a *Paladino* remand the conduct or circumstances that bear on the § 3553(a) factors must have been in existence at the time the original sentence was imposed. In this case, the § 3553(a) factors raised by the defendants all involved matters occurring after the date of sentencing. The goal of the *Paladino* remand is to determine if, at the time of sentencing, the district judge would have imposed a different sentence in the absence of mandatory

guidelines. Post-sentencing events or conduct simply are not relevant to that inquiry.

Re and Calabrese have not presented relevant evidence to rebut the presumption that their sentences, which were within the properly calculated guideline range, were reasonable when imposed. Therefore, they "cannot meet the third plain error element; namely, that the changes wrought by *Booker* 'affect[ed their] substantial rights.' " *Mykytiuk*, 415 F.3d 606, 608, 2005 WL 1592956, at *2.

We AFFIRM the sentences of both Re and Calabrese.

No. 05-680

In the Supreme Court of the United States

RANDALL RE AND ANTHONY CALABRESE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence in this case was sufficient to support the jury's finding that petitioners' conspiracy to commit extortion affected interstate commerce as required under the Hobbs Act, 18 U.S.C. 1951.

2. Whether, after a limited remand in which the district court was asked to determine whether it would have imposed the same criminal sentence if it had understood the Sentencing Guidelines to be advisory, the district court properly refused to consider petitioner's post-sentencing conduct.

3. Whether the district court committed structural error by relying at sentencing on facts not found by the jury or admitted by petitioner.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-21) is reported at 419 F.3d 582. An earlier opinion of the court of appeals (Pet. App. 1-17) is reported at 401 F.3d 828.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2005. On November 9, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 23, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioners were convicted of conspiring to commit extortion, in violation of 18 U.S.C. 1951(a), and conspiring to travel to commit extortion, in violation of 18 U.S.C. 1952. The district court sentenced each petitioner to 87 months of imprisonment, to be followed by three years of supervised release, and a fine of $12,500. Pet. App. 6. The court of appeals affirmed the convictions but ordered a limited remand for the district court to determine whether it would have imposed different sentences if it had understood the Sentencing Guidelines to be advisory. *Id.* at 1-17. On remand, the district court held that it would have imposed the same sentences under advisory Guidelines. See *id.* at 19. The court of appeals affirmed petitioners' sentences. *Id.* at 18-21.

1. Petitioner Re and his wife jointly owned a warehouse in Englewood, Florida. Gregory Leach, the victim of petitioners' extortionate scheme, owned a warehouse on adjacent property. Over the years, Re and Leach had numerous disputes concerning their warehouses. Pet. App. 1-2.

In 1997, petitioner Re listed his warehouse for sale. A potential buyer, Jimmy Daughtry, came forward but made an offer substantially below the asking price. Re made a counter offer, but Daughtry never responded. Pet. App. 2; Gov't C.A. Br. 5.

Daughtry ultimately decided not to buy petitioner Re's warehouse, opting instead to lease warehouse space from Leach. On April 17, 1997, a real estate agent informed Re that Leach had told Daughtry that a sewer line for Re's warehouse had been installed across Leach's property without appropriate permits or inspec-

tions. The real estate agent also told Re that this disclosure had prevented the sale of petitioner's warehouse to Daughtry. Pet. App. 2; Gov't C.A. Br. 5.

On May 3, 1997, Leach was contacted by another "potential lessee," who identified himself as Sammy Bender. Leach met "Bender" at the warehouse. In response to Bender's questions, Leach confirmed that he owned the warehouse and knew Daughtry. A second person then struck Leach from behind with a baseball bat, and Bender began punching Leach in the face and throat. Leach fell to the floor, and one of the assailants took from him a gun that Leach had brought to the meeting. The assailants continued to beat Leach as he lay on the ground. As they did so, they instructed Leach to tell Daughtry to move out. They also repeatedly asked Leach if he was "getting the message," and Leach indicated that he was. Pet. App. 2-3.

Between April 22 and April 30, 1997, petitioners Re and Calabrese, both of whom live near Chicago, Illinois, made 13 calls to each other. On May 2, 1997, Calabrese flew to Florida, where he rented a car. Two days later, Calabrese gave his friend Dennis Kowalski a gun that was later determined to have been taken from Leach. Leach subsequently identified Calabrese in a photographic array as the assailant "Bender." Pet. App. 4-5; Gov't C.A. Br. 9-11.

2. In May 2002, a federal grand jury in the Northern District of Illinois returned a two-count indictment against petitioners. Count One charged them with violating the Hobbs Act, 18 U.S.C. 1951(a), which establishes criminal penalties for any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do."

Petitioners were charged with "conspir[ing] to commit extortion, which extortion would and did affect commerce." Indictment 1. Count Two of the indictment charged petitioners with conspiring to travel in interstate commerce to commit extortion, in violation of 18 U.S.C. 1952. Pet. App. 6.

To prove the interstate-commerce element of the charged Hobbs Act offense, the government established through the testimony of Leach that (1) Leach used out-of-state paint, gasoline, and tools (including an Echo brand weed-eater) in doing maintenance on the warehouse; (2) Leach used the rental payments from Daughtry to pay maintenance expenses; and (3) Leach's loss of rents reduced the funds available to pay those expenses. Pet. App. 12; Gov't C.A. Br. 15-16. A jury found petitioners guilty of both of the charged offenses. Pet. App. 6.

In sentencing petitioners, the district court treated the Sentencing Guidelines as mandatory. Petitioners' Guidelines sentences included three enhancements based on facts found by the court by a preponderance of the evidence. Pet. App. 15.

3. Petitioners appealed their convictions and sentences. On January 12, 2005, while petitioners' appeals were pending before the Seventh Circuit, this Court issued its decision in *United States* v. *Booker*, 543 U.S. 220. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004). *Booker*, 543 U.S. at 230-245. The Court further held that the constitutional infirmity was most appropriately

eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for unreasonableness. *Id.* at 246-268.

4. After this Court issued its decision in *Booker*, the court of appeals affirmed petitioners' convictions but ordered a limited remand to allow the district court to determine whether it would have imposed the same sentences if it had understood the Guidelines to be advisory. Pet. App. 1-17.

a. Petitioners argued that the evidence was insufficient to sustain their Hobbs Act convictions because the government had not established that the conspiracy to commit extortion affected interstate commerce. The court of appeals rejected that contention, holding that the government had shown the required effect on interstate commerce under a "depletion of assets theory." Pet. App. 11-14. The court explained that the government had established the following connections between petitioners' extortionate conduct and interstate commerce: (1) Leach's loss of rent payments diminished the funds available to pay warehouse expenses; (2) in maintaining the warehouse, Leach used paint, tools, and gasoline (for certain equipment) from outside the State of Florida; (3) Leach used an Echo brand weed-eater to cut weeds and grass around the warehouse; and (4) Echo is located in Zurich, Illinois, and London, Ontario. *Id.* at 12. Although the court of appeals expressed concern that the government had not developed that evidence in greater detail, *id.* at 13, the court concluded that a reasonable jury could infer "that the out-of-state weed-eater, gas, paint, and tools were purchased on a customary basis by Leach exclusively for warehouse-related

maintenance." *Id.* at 14. The court found that evidence sufficient to establish the required effect on interstate commerce. *Id.* at 12, 14.

b. In challenging their sentences, petitioners argued, *inter alia*, that the federal Sentencing Guidelines violated the Sixth Amendment. Because the claim had not been raised in the district court, the court of appeals reviewed it for plain error. See Pet. App. 15. Following the procedures that it had adopted in *United States* v. *Paladino*, 401 F.3d 471 (7th Cir.), cert. denied, 126 S. Ct. 106 (2005), the court of appeals ordered a limited remand to allow the district court to determine whether it would have imposed the same sentence if it had understood the Guidelines to be advisory. Pet. App. 16-17.

5. On remand, petitioners argued that they had made extraordinary rehabilitative progress since being sentenced, and that the district court should take that fact into consideration in determining appropriate sentences under the advisory Guidelines regime. See Pet. App. 19. The district court stated that it was not sure what term of imprisonment it would impose if it took into consideration petitioners' conduct since the time of their original sentencing. *Ibid.* The district court construed the court of appeals' remand order, however, as precluding consideration of post-sentencing events and conduct. See *id.* at 19-20. The district court found that, in light of the seriousness of the violent crimes that petitioners had committed, it would have imposed the same sentences even if it had understood the Guidelines to be advisory. *Id.* at 19.

6. The court of appeals affirmed, holding that petitioners had failed to establish reversible plain error. Pet. App. 18-21. The court rejected petitioners' argument that the district court should have considered their

post-sentencing conduct. The court explained that "[t]he purpose of the limited remand is to decide whether the court committed plain error when it originally sentenced the defendants." *Id.* at 20. In light of the district court's determination that it would have imposed the same sentences if it had understood the Guidelines to be advisory, the court of appeals held that petitioners had not been prejudiced by the district court's earlier treatment of the Guidelines as mandatory, and that petitioners therefore could not establish plain error. *Ibid.* Because the purpose of a *Paladino* remand is to determine whether plain error occurred at the original sentencing, the court of appeals concluded, "[p]ost-sentencing events or conduct simply are not relevant to th[e] inquiry." *Id.* at 21.

ARGUMENT

Petitioners contend that (1) the evidence was insufficient to prove the effect on interstate commerce required under the Hobbs Act (Pet. 4-6), (2) their post-sentencing conduct should have been considered on the limited *Paladino* remand (Pet. 6-8), and (3) the district court committed structural error in enhancing their sentences based upon facts not found by the jury or admitted by petitioners (Pet. 8-12). Those claims lack merit and do not warrant this Court's review.

1. a. The Hobbs Act makes it a federal crime to commit an act of extortion (or attempt or conspire to do so) that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). That broad jurisdictional language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or